STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **CONSUMERS POWER COMPANY** for authority to increase its rates for the sale of electricity.	)	Case No. U-10685
In the matter of the application of **CONSUMERS POWER COMPANY** for accounting and ratemaking approval of changes in plant accounting and depreciation practices for electric and common utility plant.	)	Case No. U-10754
In the matter of the application of **CONSUMERS POWER COMPANY** for approval of a special competitive services rate, for certain accounting and ratemaking approvals in connection with that service, and for other relief.	)	Case No. U-10787

At the July 31, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

On November 14, 1996, the Commission issued an order resolving numerous issues in these consolidated cases. On April 10, 1997, the Commission issued an order addressing the issues raised on rehearing. On May 9, 1997, Attorney General Frank J. Kelley (Attorney General) filed a claim of appeal with the Court of Appeals. On June 5, 1997, the Attorney General filed with the Commission an application to present

additional evidence pursuant to MCL 462.26(6); MSA 22.45(6) [Section 26(6)] and attached the proposed testimony and exhibit of William A. Peloquin, who had previously testified in these cases.

On June 26, 1997, Consumers Energy Company (Consumers)[1] filed a response.

The evidence that the Attorney General offers relates to one issue in the consolidated cases: approval for Consumers to recover from its ratepayers the costs of an additional 325 megawatts (MW) of capacity that it has under contract with the Midland Cogeneration Venture Limited Partnership (MCV). The proposed testimony says that Consumers itself recently estimated the market price of capacity through 2007 to be approximately ½ cent per kilowatt-hour (kWh), when the November 14, 1996 order approved capacity rates for the additional MCV capacity ranging from 2.86 cents to 3.62 cents per kWh. The testimony calculates that the additional MCV capacity will thereby increase Consumers' stranded costs by $800 million to $1 billion. The testimony also notes that customers have requested 975 MW of direct access service under the Rate DA tariff approved by the November 14, 1996 order and that the Commission's June 5, 1997 order in Case No. U-11290 opens up 150 MW of customer load to direct access each year from 1997 through 2001 (or 750 MW in total) and permits all customers to choose an alternative supplier in 2002. The testimony concludes that the capacity rates approved by the November 14, 1996 order are too high and will unnecessarily increase Consumers' stranded cost and that it is unnecessary for the Commission to approve Consumers' purchase of additional long-term capacity from the MCV when there is so much interest among customers in taking electric service from other suppliers.

The Attorney General says that the evidence is both different from and in addition to the evidence presented at the original hearings. With respect the reasonableness of the rate for the MCV capacity, he says that no evidence of the type he now offers was presented earlier because stranded costs were not an issue, but

[1]Effective March 11, 1997, Consumers Power Company became Consumers Energy Company.

have now moved to the forefront. He also says that the evidence did not become available until March 7, 1997 when Consumers filed, in Case No. U-11290, its proposal for restructuring the electric industry. With respect to the need for new long-term capacity, he asserts that only after the Commission issued its November 14, 1996 order did it become apparent how many customers were actively pursuing alternatives to retail service from Consumers and the amount of load at issue. He also notes that the significant expansion of direct access envisioned by the June 5, 1997 order in Case No. U-11290 could not have been known during the original hearings.

Section 26(6) provides in part:

> Within 28 days from the filing of an appeal, a party may make application to the commission to present additional evidence. A copy of the application for additional evidence shall be filed in the court of appeals and the court shall stay further appellate proceedings pending the commission's receipt and consideration of the proposed evidence. If the commission finds that the proposed evidence is different from or in addition to the evidence presented at the original hearing, the commission shall receive the additional evidence. After considering the additional evidence, the commission may alter, modify, amend, or rescind its order . . . and shall report its decision to the court of appeals within the time period prescribed by the court.

MCL 462.26(6); MSA 22.45(6).

The Commission concludes that the evidence offered by the Attorney General is not "different from or in addition to" within the meaning of Section 26(6), which requires that the evidence differ from or add to the prior evidence in substance and not merely be cumulative or repetitive. This interpretation of Section 26(6) is consistent with the Administrative Procedures Act of 1969 (APA), MCL 24.201 et seq.; MSA 3.560(101) et seq., the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq., and the Michigan Rules of Evidence (MRE). Section 75 of the APA provides that an agency may exclude "unduly repetitious evidence." MCL 24.275; MSA 3.560(175). That same section and Rule 325 of the Commission's Rules of Practice and Procedure require the Commission to follow the rules of evidence in

circuit court. 1992 AACS, R 460.17325(1). MRE 403 permits the exclusion of evidence to prevent the "needless presentation of cumulative evidence."

It is true, of course, that Consumers' March 7, 1997 estimate of the market price of capacity could not be on a record that closed a year before (on March 12, 1996), but the costs of alternatives to the MCV capacity are on the record. For example, James P. McGaughy testified for the Attorney General about the price of alternatives to the MCV and concluded that the proposed price for the MCV capacity was too high. 11 Tr. 1625-1626 and 1628-1629; Exhibits I-48, I-50, and I-54.[2] James T. Selecky testified for the Association of Businesses Advocating Tariff Equity (ABATE) about the price of the MCV capacity. Among other things, he testified that Consumers had contracted under a multi-year contract to buy capacity and energy from Ontario Hydro at less than 1.9 cents per kWh in 1996, which Consumers had characterized as very competitive. 13 Tr. 1931-1932. Given that the MCV energy charges were approximately 2.1 cents per kWh in 1996, 13 Tr. 1926, the Ontario Hydro purchase implies a negative value for the MCV capacity in 1996, which is less than the price that the Attorney General now seeks to place on the record. In addition, in Case No. U-10685 before consolidation, Michel L. Hiser of the Commission Staff had testified that, rather than seek recovery for additional MCV capacity, Consumers could implement additional demand-side management at 2.6 cents per kWh. Case No. U-10685, 12 Tr. 1693-1694. Again, at 2.1 cents per kWh for the MCV energy rate in 1996, the cost of demand-side management implies a value for the MCV of a half cent, the same as the rate the Attorney General now seeks to place on the record. Furthermore, the Attorney General has argued that, as a matter of federal law, the additional MCV capacity has a capacity cost of zero. Attorney General's April 12, 1996 brief, pp. 12-14; Attorney General's April 29, 1997 reply brief, pp. 5-6.

[2] All transcript and exhibit references are to the record after consolidation unless a single case number is noted before the transcript volume number.

It is also true that a tally of customer applications for Rate DA could not be on a record that closed more than a year before customers could apply for the rate (and likewise for the June 5, 1997 order calling for an expansion of customer choice to all customers by 2002), but there was evidence that permitting customers to seek their own sources of generation services through direct access was an alternative to adding new system capacity. Attorney General witness McGaughy testified that Consumers did not need the 325 MW of additional MCV capacity. 11 Tr. 1618-1621, 1628. He noted that "one of the features of the [proposal before the Commission] is that 650 MW of existing customer load will be given the opportunity to leave Consumers' system and purchase power from alternate suppliers." 11 Tr. 1620. Furthermore, the expansion of direct access was under consideration while the record was open. On January 8, 1996, Governor Engler forwarded to the Commission for its review and action the recommendations of the Michigan Jobs Commission for electric and gas utility reform, including a recommendation that all industrial and commercial customers be permitted to engage in direct access by January 1, 2001.

The proposed testimony also addresses again the arguments that Consumers' need to obtain approval for the remaining high cost MCV capacity was brought on by Consumers' unreasonable act of amending the power purchase agreement to remove the regulatory out clause and that a large part of the MCV costs would become stranded in the new, competitive market. Attorney General witness Peloquin previously testified that the contract amendment was unreasonable and that "the additional MCV capacity is already 'stranded investment'." 12 Tr. 1810, 1813. Attorney General witness Ralph E. Miller also discussed how the fixed costs of the additional MCV capacity could become stranded. 9 Tr. 1390-1391. ABATE witness Selecky also addressed these issues. 13 Tr. 1934-1935; 1939.

In these consolidated cases, and in other cases, the Commission has repeatedly heard evidence and argument alleging that the MCV capacity is too expensive, that long-term capacity is not needed, and that customers want lower rates and the right to choose alternative energy suppliers. As discussed above, the

evidence that the Attorney General now offers is merely cumulative and repetitive of evidence already on the record. Furthermore, before it issued the November 14, 1996 order, the Commission fully considered the issues that the Attorney General seeks to raise yet again, (i.e., emerging competition, the need for and price of the MCV capacity, and stranded costs). See, pp. 10-11, 36-39, 53, and 59. In light of the prior evidence and the Commission's consideration of the issues, the Attorney General cannot argue that the evidence he offers is necessary for the development of a full and complete record or that there has been a change in circumstances such that the public interest requires the admission of cumulative evidence. The Commission therefore rejects the Attorney General's application to present additional evidence.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The Attorney General's application to present additional evidence should be rejected, pursuant to Section 26(6), and these cases returned to the Court of Appeals.

THEREFORE, IT IS ORDERED that Attorney General Frank J. Kelley's application to present additional evidence is denied and these cases are returned to the Court of Appeals.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

John G. Strand
Chairman

(S E A L)

John C. Shea
Commissioner

David A. Svanda
Commissioner

By its action of July 31, 1997.

Dorothy Wideman
Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of July 31, 1997.

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Its Executive Secretary

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Suggested Minute:

"Adopt and issue order dated July 31, 1997 denying Attorney General Frank J. Kelley's application to present additional evidence and returning these cases to the Court of Appeals, as set forth in the order."